IN THE

# Supreme Court of the United States

OCTOBER TERM, 1909.—No. [redacted] 181

BUCK STOVE & RANGE COMPANY,
a corporation, et al.,
*Plaintiff in Error,*

vs.

C. C. VICKERS, MARY P. VICKERS,
and P. B. MAXSON,
*Defendants in Error.*

No. 21,824.

## MOTION TO DISMISS AND TO AFFIRM AND BRIEF AND ARGUMENT THEREON.

STEPHEN H. ALLEN,
ROBERT STONE,
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*Attorneys for defendants in error.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1909.—No. 598.

BUCK STOVE & RANGE COMPANY,
a corporation, et al.,
*Plaintiff in Error,*

vs.

C. C. VICKERS, MARY P. VICKERS,
and P. B. MAXSON,
*Defendants in Error.*

No. 21,824.

## MOTION TO DISMISS.

Now come the defendants in error, C. C. Vickers, Mary P. Vickers and P. B. Maxson, and respectfully state to the Court that the plaintiffs in error seek in this case to reverse a judgment of the Supreme Court of Kansas, affirming a judgment of the district court of Saline county, Kansas, rendered in an action brought by seven corporations organized under the

laws of states other than Kansas, to subject certain lands belonging to the defendant, P. B. Maxson, to the payment of judgments rendered in favor of the plaintiffs in error, severally, against C. C. Vickers *et al.*, on the ground that such land had been conveyed by Vickers to Maxson in fraud of the creditors of Vickers. No contractual relation was claimed to have existed between the plaintiffs or any of them and Maxson, but the action was prosecuted solely for the purpose of taking Maxson's property for Vickers' debts because of alleged fraud in the transfer from Vickers to Maxson.

Two actions were brought in the district court of Morris county, in one of which the Buck Stove & Range Company, Samuel Cupples Woodenware Company and Altman, Miller & Company were plaintiffs, and in the other Consolidated Steel & Wire Company, St. Louis Refrigerator & Wooden Gutter Company, St. Louis Glass & Queensware Company and Galveston Rope & Twine Company were plaintiffs. These actions were consolidated for trial and the venue afterward changed to Saline county, where the cases were tried and determined.

In the Supreme Court of Kansas, Altman & Miller Buckeye Company, claiming to be the successor in interest of Altman, Miller & Company and Galveston Rope Company, claiming to be successor in interest of

Galveston Rope & Twine Company, were joined as plaintiffs in error, although neither of them was ever made a party in the trial court, and they again appear as plaintiffs in error in this Court. The Consolidated Steel & Wire Company went out of existence October 23, 1899, by voluntarily surrendering its charter in accordance with the laws of the State of Illinois, from which its charter had been obtained, but its name appears as a joint plaintiff in error in the Supreme Court of Kansas and again in this Court.

The defendants moved to dismiss the action on the ground that the plaintiffs were each and all foreign corporations doing business in the state and that neither of them had complied with the law of the state by filing a statement of the condition of the corporation as required by the statute. (Record p. 7.) The same question was afterward raised by amended answers. (Record, pp. 8 to 18.)

Section 12, chapter 10 of the laws of 1898, as amended by section 3, chapter 125 of the laws of 1901 and which now appears as Section 42 of Ch. 23 of the General Statutes of 1905, is as follows:

"Sec. 42. It shall be the duty of the President and Secretary or the managing officer of each corporation for profit doing business in this state, except banking, insurance and railroad corporations, annually, on or before the first day of August, to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day

of June next preceding. Such statement shall set forth and exhibit the following, *namely:* 1st. The authorized capital stock; 2nd. The paid up capital stock; 3rd. The par value and the market value per share of said stock; 4th. A complete and detailed statement of the assets and liabilities of the corporaiton; 5th. A full and complete list of the stockholders, with the post office address of each, and the number of shares held and paid for by each; 6th. The names and post office addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held. Such report shall be made upon and in conformity to blanks prepared by the secretary of state and approved by the charter board. The fee for filing such report and making a certificate that the same has been made and is on file shall be one dollar. The secretary of state may at any time require a further or supplementary report under this section, which shall contain the same information and data as specified in the annual report herein required; and the failure of any such corporation to file the statement in this section provided for within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this state, and the charter board may at any time thereafter declare the charter of such corporation forfeited, and upon the declaration of any such forfeiture it shall be the duty of the attorney general to apply to the district court of the proper county for the appointment of a receiver to close out the business of such corporation; and such failure to file such statement by any corporation doing business in this state and not organized under the laws of this state shall work a forfeiture of its right or authority to do business in this state, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official state paper. It shall also be the duty of the president and secretary of any such corporation organized under the laws of this state, as soon as any transfer, sale or

change of ownership of any such stock is made as shown upon the books of the company, to file with the secretary of state a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, the par value, and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act. The record of the secretary of state shall be *prima facie* evidence of the stockholders of such corporation, the number of shares held by each, and the amount paid on each share of capital stock. *No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that statements provided for in this section have been properly made.*"

On March 26, 1907, after the conclusion of the trial, the court made its findings of fact and conclusions of law (Record, pp. 35 to 42) and among other facts found that the Buck Stove & Range Co., Samuel Cupples Woodenware Co., St. Louis Refrigerator & Wooden Gutter Co., and St. Louis Glass and Queensware Co., were each foreign corporations organized under the laws of the state of Missouri, and that they were doing business in Kansas within the meaning of the section of the statute above quoted, and that they had no right to maintain the action until they complied with the provisions of the statute. (Record, pp. 35 and 41) Thereupon the court granted these corporations until August 27, 1907, to present evidence of compliance with the law. (Record, p. 42.)

The court further found that Altman, Miller & Company was declared a bankrupt in 1903 by the United States District court for the Northern District of Ohio and then ceased to do business; that no revivor of the action or substitution of the Altman & Miller Buckeye Co. was made until May, 1908, when an order of substitution was made without the consent of the defendants; that the Galveston Rope & Twine Company, a Texas corporation, had no interest in the judgment on which its suit was founded at the time of the commencement of the action, and forfeited its charter in 1896, and that the Galveston Rope Company has never been a party to the action. (Record, p. 36.)

On August 27, 1907, the four Missouri corporations, which had been doing business in Kansas without compliance with the law above quoted, filed their statement in writing declining to comply with the order of the court requiring them to present evidence of compliance with the law. (Record, p. 44.) It was then shown to the court by appropriate proof that the Consolidated Steel & Wire Company went out of existence on November 23, 1899, by voluntarily surrendering its corporate franchise. (Record, p. 45.)

The court thereupon dismissed the cases as to all the corporations which were still going concerns, and ordered that the action be abated as to the Consolidated Steel & Wire Co., Altman, Miller & Co. and the

Galveston Rope & Twine Co. No judgment or order whatever was entered against either the Altman & Miller Buckeye Co. or the Galveston Rope Co. Judgment for costs was entered against the Buck Stove & Range Co., Samuel Cupples Woodenware Co., St. Louis Refrigerator and Wooden Gutter Co. and St. Louiis Glass & Queensware Co. but not against any of the other corporations.

The judgment and orders so made have been affirmed by the Supreme Court of Kansas and from its judgment seven corporations, among which are included Altman & Miller Buckeye Co. and Galveston Rope Co. which were not parties in the district court, are joined in a writ of error from this court to the Supreme Court of Kansas, while Altman, Miller & Co. and Galveston Rope & Twine Co. which were parties in the district court, do not appear as plaintiffs in error here.

The only assignments of error which suggest a federal question are the 10th, 15th, 16th, 17th, 18th, and 19th and these questions, though not clearly stated, seem to be that the Kansas statute above quoted is void as applied to this case under the Inter-state Commerce Clause of the Constitution of the United States, and that the statute also impairs the obligations of contracts. (Record, pp. 2 and 3.)

And thereupon said defendants in error move the court to dismiss the writ of error herein upon the grounds and for the reasons following to-wit:

1. This court has no jurisdiction of the subject matter of said cause or of any question presented by the record herein.

2. The Consolidated Steel & Wire Company does not exist, and therefore cannot join or be joined as a plaintiff in error, and cannot present a federal or any other kind of a question for the consideration of this Court.

3. The Altman & Miller Buckeye Company and the Galveston Rope Company, having never been parties to the judgment rendered by the district court of Saline county, cannot prosecute a writ of error to this Court to reverse that judgment, and the refusal of the district court to make them parties does not present any question under the constitution or laws of the United States, or other basis for the jurisdiction of this court.

4. The dismissal of the actions of the four Missouri corporations for refusal to file their statements as required by the law of Kansas presents a question merely as to the exercise of a corporate power, *viz*, the power to maintain an action in a court of Kansas, and does not present any question as to the regulation of inter-state commerce or the obligation of contracts or other question which this Court has jurisdiction to determine.

5. The statute of Kansas does not in terms or in effect regulate or restrict, or attempt to regulate or

restrict, inter-state commerce but does regulate the exercise of corporate powers by corporations, both domestic and foreign, and the decision of the Supreme Court of the state as to its construction and effect is final and conclusive on this Court.

6. The record does not present a question relating to the obligation of contracts, because no contractual relation existed between P. B. Maxson and the plaintiffs, who sought to take his property for the payment of the debt of another. The action was based on an alleged wrong, a fraud, and not on any allegation of contract.

7. Joint errors only are assigned in this Court by all the plaintiffs in error jointly, (Record, pp. 1, 2 and 3) while the orders and judgment of the District Court of Saline County, which were affirmed by the Supreme Court of Kansas, were several as to each of the plaintiffs in error, based on different states of fact, which related to and affected each plaintiff in error severally, and not any two or more of them jointly.

STEPHEN H. ALLEN,

ROBERT STONE,

*Attorneys for defendants in error.*

## MOTION TO AFFIRM.

The said defendants in error also move the courts to affirm the judgment of the Supreme Court of Kansas herein on the ground that although the record may show that this court has jurisdiction, it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument, and because the question of law sought to be raised has been already decided by this Court.

STEPHEN H. ALLEN,

ROBERT STONE,

*Attorneys for defendants in error.*

## BRIEF AND ARGUMENT.

### THERE ARE NO ASSIGNMENTS OF ERROR WHICH THE COURT CAN CONSIDER.

The nineteen assignments of error are all made jointly by all the plaintiffs in error. (Record, pp. 1, 2 and 3.) So far as the Consolidated Steel & Wire Company is concerned it can make no complaint and raise no question, federal or state, because it is dead. The only complaint anyone else can make for it is that it was denied relief because it was dead and because no relief could be given to so dead a corporation. Neither of the other plaintiffs in error has any interest in the question or right to vex this court with questions raised in its behalf.

As to the Galveston Rope Company and the Altman & Miller Buckeye Company, the only question that can be raised on the record is whether they are parties to the record, and that question admits of but one answer. They are not parties. Neither of the other plaintiffs in error has any interest in this question or right to raise it, nor have these two corporations any common ground of complaint, for they were denied relief on entirely different grounds, applicable to each of them severally, and not in any particular to both

of them jointly, nor involving any question of a Federal character.

As to the other plaintiffs in error, they cannot get into this Court yoked with a dead corporation and two outsiders, which were not parties to the case below, nor have they as between themselves any joint ground of complaint. Their business was several and the showing as to each was separate and distinct. Taking all these corporations together and it is apparent that there is no common basis for the jurisdiction of this Court and no joint or common question for its consideration.

"A joint assignment of error which cannot be sustained as to all who join therein is bad as to all."

3 Cen. Digest, Sec. 2985, and authorities cited.

"An assignment of errors, like a pleading, must set forth errors which are available to all who join in it. If not good as to all it will not be good as to any. And a joint assignment not good as to all will be defective although it contains proper separate specifications of error."

2 Encyc. Pl. and Pr., 933, and cases cited in the notes.

"Upon a joint assignment of error one of several appellants or plaintiffs in error cannot avail himself of errors which are not common to all his co-appellants but which affect him alone. Nor can parties jointly assign error or take advantage of errors which affect them severally and not jointly. It is an elementary and well-settled rule that joint assignments of error must be good as to all who join therein, or

they will not be available as to any of them. If the assignment of error is not good as to one, it will be overruled as to all. This doctrine has been applied in a host of decisions, and under widely-varying circumstances. Thus a joint assignment of error by several appellants presents no question as to a ruling against one of the appellants only, and is ineffective for any purpose. Accordingly a joint assignment of error by several to the ruling of the court on the separate demurrer of one of them presents no question for the appellate court. A joint assignment of error based upon the action of the court in overruling a motion for a new trial cannot be considered on appeal, where the motion for a new trial appearing in the records was the sole and separate motion of one of the appellants. It has also been held that where parties join in a demurrer, which is overruled as not being good as to one, the other party, if the overruling is error as to him, can make it available only on a separate assignment of error. If appellants jointly assign as error the rulings on the separate demurrers of each, and separate motions for a new trial, such an assignment of error presents no question for the decision of the appellate court, nor is a defect of this character waived by a joinder in error. If a party for whom judgment was rendered and the other appellants jointly assign errors, the assignment will be bad and the appeal will be dismissed. A joint assignment of errors by several defendants, that the complaint does not charge facts sufficient to constitute a cause of action, cannot be sustained unless the complaint is bad as to all."

2 Cyc. 1003, and authorities cited.

"As the verdicts and judgments were several the writ of error sued out by the defendants jointly was superfluous and may be dismissed without costs, and upon each of the writs of error sued out by the defendants severally the order will be judgment reversed."

*Mutual Life Ins. Co. vs. Hillmon*, 145 U. S. 285.

We respectfully submit that the assignments of error are insufficient to present any question for the consideration of this Court.

## NO FEDERAL QUESTION IS PRESENTED AS TO ANY PLAINTIFF IN ERROR.

No question as to the power of the legislature of Kansas to regulate, tax, restrict, or control inter-state commerce is presented by the record. The section of the statute above quoted imposes as a condition to the use of the courts of the state by corporations, whether domestic or foreign, that they shall file annual statements showing the condition of their affairs for the information of the public. In the passage of this statute the legislature had in view regulation of the exercise of corporate powers, not regulation of commerce, manufacturing, agriculture, or any other industry. For a corporation to sue or maintain a suit or recover a judgment is to exercise a corporate power. This power it can derive only from the state. One of the powers acquired by every corporation by virtue of its charter is, "to sue or be sued", (1 Blackstone, 475), "second, to maintain and defend judicial proceedings," Gen. Stats. of Kansas, 1905, Ch. 23, Sec. 25. Clearly a domestic corporation acquires its power in Kansas to maintain and defend judicial proceedings from the legislature. It is immaterial what the

business of the corporation may be. Suppose a Kansas corporation to be engaged solely in inter-state commerce, as the exportation of grain from Kansas to other states, can there be any doubt as to the power of the legislature of Kansas to prescribe the terms on which a domestic corporation of that kind shall exercise any corporate power, or on which it may be admitted to maintain suits in its courts? If the power of the state to prescribe the terms on which domestic corporations may exercise their powers within its territory is plenary, can foreign corporations demand protection from its courts while refusing to comply with the terms imposed alike on them and on domestic corporations? The law is well settled by a long line of decisions of this Court that the terms on which a foreign corporation may exercise corporate powers within any state may be fixed by such state in its discretion and without being subject to any supervision or control by federal authority. The statute under consideration, as construed by the Supreme Court of the state, does not render contracts made by foreign corporations with citizens of the state void, where the corporation fails to comply with the law, nor does it absolutely deny a remedy in the courts of the state. It is held to be the duty of the court after proof of failure to comply with the law to still afford an opportunity to do so, and where the statements are filed out of time, or even where there is a *bona fide* effort

to comply, the suit will not be dismissed. (See prior decision of the Supreme Court of Kansas in this case, *Vickers vs. Buck*, 70 Kan., 584, and *Jordan vs. Telegraph Co.*, 69 Kan., 140.) In this case the court afforded the plaintiffs ample opportunity to comply with the law. They were given from March 26 to August 27, five months and a day, in which to file their statements and present their certificates to the court showing that they had done so. They not only failed to comply with the law, but came into court and deliberately refused to do so. (Record, p. 44.) Under such circumstances it is perfectly clear that a Kansas corporation, even though engaged exclusively in interstate commerce, would have been denied relief, and that it would have had no question to present to this Court for its consideration. Can it be seriously contended that a Missouri corporation has superior rights to a domestic corporation under identically the same state of facts? The facts on which the decision of the Supreme Court of Kansas was based are not open to question in this Court.

"The decisions of state courts upon questions of fact are not reviewable by writ of error to those courts from the Supreme Court of the United States."

*Chapman & Dewey Land Co. vs. Bigelow*, 206 U. S., 41;

*Thayer vs. Spratt*, 189 U. S., 346;

*Gleason vs. White*, 109 U. S., 854;

*Israel vs. Arthur*, 152 U. S., 355;

*Eau Claire Natl. Bank vs. Jackman*, 204 U. S. 522;

*Dower vs. Richards*, 151 U. S., 658.

"The scope and meaning of a state statute, as determined by the highest court of the state, conclude the federal Supreme Court in determining on writ of error to the state court whether or not such statute violates the federal constitution."

*Smiley vs. Kansas*, 196 U. S., 447;

*National Cotton Oil Co. vs. Texas*, 197 U. S. 115;

*Tampa Waterworks Co. vs. Tampa*, 199 U. S. 241.

"The corporation being the mere creation of local law can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta vs. Earle*, 'It must dwell in the place of its creation and cannot migrate to another sovereignty'. The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will

best promote the public interests. The whole matter rests in their discretion."

*Paul vs. Virginia*, 8 Wal., 168;

*Ducat vs. Chicago*, 10 Wal., 410;

*Horn Silver Mining Co. vs. State of New York*, 143 U. S., 305.

"The principle that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state has been long settled and many phases of its application have been illustrated by the decisions of this court." . . .

"It is evident, then, as we have said above, that the attempt to so distinguish between policies of marine insurance and policies of fire insurance, as to reach the deduction that there is a constitutional difference between the business of a corporation issuing policies of one kind and that of a corporation dealing in policies of the other kind, which affects the question of the state's authority to control the business of either, is based upon a fundamental misconception of the nature of the constitutional provision relied upon. It ignores the real distinction upon which the general rule and its exceptions are based, and which consist in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incident which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature.

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea'. The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the condition on which the entry shall be made. And as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting who is in her jurisdiction with any foreign company which had not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

*Hooper vs. California*, 155 U. S., 648.

This Court has upheld far more drastic legislation, designed to regulate the business of foreign corporations, than that now under consideration. In the case of *Chattanooga National B. & L. Assn. vs. Denson*, 189 U. S., 408, a bill to foreclose a mortgage taken in

Alabama by a Tennessee building and loan association without compliance with the corporation laws of Alabama was dismissed because the corporation was doing business in the state in violation of law, although the making of this loan upon the written application of the borrower, obtained by a traveling agent of the association, was the only business shown to have been done by the association within the state.

"The offence of a failure to comply with the corporation laws of the state of Kansas was an offence against the state and not against the complainants in this suit. For that offence the state had ample remedy. It could prevent the maintenance of actions by this corporation in its courts."

*Blodgett vs. Lanyon Zinc Co.*, C. C. A. 120 Fed., 893-8.

It has been held that the prohibition to sue in the courts of the state does not deprive the federal courts within the state of jurisdiction.

Id. 120 Fed. 893;

*Sullivan vs. Beck*, 79 Fed., 20.

"The courts of equity in this state are not open to the plaintiff" (a New Hampshire corporation) "as matter of strict right, but as matter of comity; *Smith vs. Mutual Life Ins. Co.*, 14 Allen, 336, 339."

*National Tel. Mfg. Co. vs. Du Bois*, 165 Mass., 117.

*Erie Ry. Co. vs. State*, 31 N. J. L., 531.

19 Cyc., 1315.

Statutes similar to the one under consideration exist

in many states, while in other states more stringent provisions have been enacted, either utterly prohibiting the transaction of business within the state or rendering contracts made without compliance with the statute utterly void. Such statutes, even though regarded as unreasonable in their terms, have been held to be within the legislative power of the state and enforced according to their terms, 19 Cyc. 1298.

The question here presented is as to the right of a foreign corporation to prosecute an action for a tort in a court of the state of Kansas. That right has been denied, and the reason for its denial is that the plaintiffs have refused to comply with a police requirement now almost universally found in the legislation of the states. Interstate commerce is not primarily or secondarily affected by the decision under consideration. It is not affected at all, for the plaintiffs were not excluded from doing business in the state. They were not taxed for doing it, and the contracts made by them are not even made unlawful. They had their option to comply with the law within the time allowed them by the court and take their judgment, or to refuse to comply with it and go out of court. They chose the latter course and the court merely enforced the law of the state governing the conditions under which a foreign corporation may use its courts.

The fact that a foreign corporation is engaged in interstate commerce under authority of Congress will not make void a tax imposed on that part of the business of the corporation done exclusively within the state.

*Postal Telegraph Co. vs. Charleston*, 153 U. S., 692.

It is within the power of a state to render the contract of a corporation which fails to comply with its police requirements absolutely void and the federal court will enforce such statute.

"This is an action upon a written contract alleging a breach and claiming damages. It was brought in the United States Circuit Court for the Eastern District of Wisconsin by an Illinois corporation against a Wisconsin corporation. On June 25, 1898, the date when the contract was made, a law had been enacted in Wisconsin, to go into operation later, on September 1, 1898, requiring corporations incorporated elsewhere to file a copy of their charter with the secretary of state, and to pay a small fee as a condition of doing business there. (Wis. Stat. 1898, Secs. 1770b-4978.) This it was admitted that the plaintiff had not done, and the defendant set up that the contract was a contract to do business in Wisconsin after the statute took effect, and that the defendant was justified by the statute in declining to go on. The judge sustained this defence, and the plaintiff excepted, contending that the statute did not, and could not, constitutionally affect its rights under the contract in question. . . .

"A prohibition of the doing of business after a statute goes into effect is not retroactive with regard to that business, even though the business be done in pursuance of an earlier contract. The suggestion needing discussion is whether the statute impairs the ob-

ligation of the contract. We are of opinion that it is not open to that objection. We leave on one side the question how the obligation of a contract can be impaired by a law enacted before the contract was made. *Tenney vs. Nelson*, 183 U. S. 144. Again, we need not consider in all its full breadth whether or how far, notwithstanding *Security Sav. & L. Asso. vs. Elbert*, 153 Ind. 198, a corporation, by making a contract reaching years into the future, can exonerate itself from all police or license laws, on the ground that by indirection they make performance of the contract more difficult to an infinitesimal degree. Compare *Curtis vs. Whitney*, 13 Wall. 68, 71, *Bedford vs. Eastern Bld. & L. Asso.*, 181 U. S. 227, 241. We shall advert to parallel considerations in connection with the alleged interference with commerce between the states. The prohibition in this case is not absolute, but is only conditional on the failure to deposit a copy of the plaintiff's charter and to pay a small fee. It is merely incident to a regulation which, but for the contract, unquestionably would be proper, and which is familiar in the laws of the state. It can be avoided by compliance with the regulations. We are not prepared to say that the regulation would be unreasonable or invalid as to such a contract as this, even if enacted after the contract was made. But we rest our decision upon the narrower ground of the foregoing consideration taken in connection with what we are about to say. . . .

"In modern societies every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernable, to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made."

*Diamond Glue Co. vs. United States Glue Co.*,
187 U. S., 611.

No question was raised either in the district court or the Supreme Court of Kansas under section 2 of Article IV of the Constitution of the United States, but if such a question had been raised it would have been of no avail to the plaintiffs in error for the law is well settled by the decisions of this Court that a corporation is not a citizen within the meaning of the constitutional provision that, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

*Pembina Mining Co. vs. Pennsylvania*, 125 U. S., 181;

*Blake vs. McClung*, 172 U. S., 239.

Whatever doubts may have been formerly entertained on the subject, it is now well settled law that the right of a foreign corporation to exercise its corporate powers within a state other than that of its creation depends solely upon the will of such other state.

*Waters Pierce Oil Co. vs. Texas*, 177 U. S., 28;

*People vs. Roberts*, 171 U. S., 658.

As this is the only question in fact presented by the record and as no attempt has been made by the state of Kansas to interfere with interstate commerce, or to lay any tax or burden on it, we respectfully submit that the record fails to present any question which this Court has jurisdiction to determine, and that the writ of error herein should therefore be dismissed.

*Waters Pierce Oil Co. vs. Texas*, 212 U. S., 112.

If, however, the Court should be of opinion that it has jurisdiction of the cause, we further respectfully submit that the questions presented by the record have been finally and definitely settled by prior decisions of this Court, and that there is no longer room for controversy in this Court on any proposition involving a federal question which was decided or ought to have been decided by the Supreme Court of Kansas.

Stephen H. Allen

Robert Stone

Allen & Allen

*Attorneys for defendants in error.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1911.—No. 10

BUCK STOVE & RANGE COMPANY,
a corporation, et al.,
*Plaintiff in Error,*
vs.
C. C. VICKERS, MARY P. VICKERS,
and P. B. MAXSON,
*Defendants in Error.*

No. 21,[illegible]

## BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

STEPHEN H. ALLEN,
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[illegible] PRINTING CO.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1911.—No. 131.

BUCK STOVE & RANGE COMPANY, a corporation, et al., *Plaintiff in Error,*
vs.
C. C. VICKERS, MARY P. VICKERS, and P. B. MAXSON, *Defendants in Error.*
No. 21,824.

At the October, 1909, term of the Court the defendants in error filed and submitted on briefs their motion to dismiss the writ of error herein for want of jurisdiction. The hearing on the motion was then continued to be heard with the case on the merits.

The motion, omitting the caption, is as follows:

## MOTION TO DISMISS.

Now come the defendants in error, C. C. Vickers, Mary P. Vickers and P. B. Maxson, and respectfully state to the Court that the plaintiffs in error seek in this case to reverse a judgment of the Supreme Court

of Kansas, affirming a judgment of the district court of Saline county, Kansas, rendered in an action brought by seven corporations organized under the laws of states other than Kansas, to subject certain lands belonging to the defendant, P. B. Maxson, to the payment of judgments rendered in favor of the plaintiffs in error, severally, against C. C. Vickers *et al.*, on the ground that such land had been conveyed by Vickers to Maxson in fraud of the creditors of Vickers. No contractual relation was claimed to have existed between the plaintiffs or any of them and Maxson, but the action was prosecuted solely for the purpose of taking Maxson's property for Vickers' debts because of alleged fraud in the transfer from Vickers to Maxson.

Two actions were brought in the district court of Morris county, in one of which the Buck Stove & Range Company, Samuel Cupples Woodenware Company and Altman, Miller & Company were plaintiffs, and in the other Consolidated Steel & Wire Company, St. Louis Refrigerator & Wooden Gutter Company, St. Louis Glass & Queensware Company and Galveston Rope & Twine Company were plaintiffs. These actions were consolidated for trial and the venue afterward changed to Saline county, where the cases were tried and determined.

In the Supreme Court of Kansas, Altman & Miller Buckeye Company, claiming to be the successor in interest of Altman, Miller & Company and Galveston Rope Company, claiming to be successor in interest of Galveston Rope & Twine Company, were joined as plaintiffs in error, although neither of them was ever made a party in the trial court, and they again appear as plaintiffs in error in this Court. The Consolidated Steel & Wire Company went out of existence October 23, 1899, by voluntarily surrendering its charter in accordance with the laws of the State of Illinois, from which its charter had been obtained, but its name appears as a joint plaintiff in error in the Supreme Court of Kansas and again in this Court.

The defendants moved to dismiss the action on the ground that the plaintiffs were each and all foreign corporations doing business in the state and that neither of them had complied with the law of the state by filing a statement of the condition of the corporation as required by the statute. (Record p. 7.) The same question was afterward raised by amended answers. (Record, pp. 8 to 18.)

Section 12, Chapter 10 of the laws of 1898, as amended by section 3, chapter 125 of the laws of 1901 and which now appears as Section 42 of Ch. 23 of the General Statutes of 1905, is as follows:

"Sec. 42. It shall be the duty of the President and Secretary or the managing officer of each corporation for profit doing business in this state, except banking, insurance and railroad corporations, annually, on or before the first day of August, to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, *namely:* 1st. The authorized capital stock; 2nd. The paid up capital stock; 3rd. The par value and the market value per share of said stock; 4th. A complete and detailed statement of the assets and liabilities of the corporation; 5th. A full and complete list of the stockholders, with the post office address of each, and the number of shares held and paid for by each; 6th. The names and post office addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held. Such report shall be made upon and in conformity to blanks prepared by the secretary of state and approved by the charter board. The fee for filing such report and making a certificate that the same has been made and is on file shall be one dollar. The secretary of state may at any time require a further or supplementary report under this section, which shall contain the same information and data as specified in the annual report herein required; and the failure of any such corporation to file the statement in this section provided for within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this state, and the charter board may at any time thereafter declare the charter of such corporation forfeited, and upon the declaration of any such forfeiture it shall be the duty of the attorney general to apply to the district court of the proper county for the appointment of a receiver to close out

the business of such corporation; and such failure to file such statement by any corporation doing business in this state and not organized under the laws of this state shall work a forfeiture of its right or authority to do business in this state, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official state paper. It shall also be the duty of the president and secretary of any such corporation organized under the laws of this state, as soon as any transfer, sale or change of ownership of any such stock is made as shown upon the books of the company, to file with the secretary of state a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, the par value, and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act. The record of the secretary of state shall be *prima facie* evidence of the stockholders of such corporation, the number of shares held by each, and the amount paid on each share of capital stock. *No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that statements provided for in this section have been properly made.*"

On March 26, 1907, after the conclusion of the trial, the court made its findings of fact and conclusions of law (Record, pp. 35 to 42) and among other facts found that the Buck Stove & Range Co., Samuel Cupples Woodenware Co., St. Louis Refrigerator & Wooden Gutter Co., and St. Louis Glass and Queensware Co., were each foreign corporations organized under the

laws of the state of Missouri, and that they were doing business in Kansas within the meaning of the section of the statute above quoted, and that they had no right to maintain the action until they complied with the provisions of the statute. (Record, pp. 35 and 41.) Thereupon the court granted these corporations until August 27, 1907, to present evidence of compliance with the law. (Record, p. 42.)

The court further found that Altman, Miller & Company was declared a bankrupt in 1903 by the United States District court for the Northern District of Ohio and then ceased to do business; that no revivor of the action or substitution of the Altman & Miller Buckeye Co. was made until May, 1908, when an order of substitution was made without the consent of the defendants; that the Galveston Rope & Twine Company, a Texas corporation, had no interest in the judgment on which its suit was founded at the time of the commencement of the action, and forfeited its charter in 1896, and that the Galveston Rope Company has never been a party to the action. (Record, p. 36.)

On August 27, 1907, the four Missouri corporations, which had been doing business in Kansas without compliance with the law above quoted, filed their statement in writing declining to comply with the order of the court requiring them to present evidence of

compliance with the law. (Record, p. 44.) It was then shown to the court by appropriate proof that the Consolidated Steel & Wire Company went out of existence on November 23, 1899, by voluntarily surrendering its corporate franchise. (Record, p. 45.)

The court thereupon dismissed the cases as to all the corporations which were still going concerns, and ordered that the action be abated as to the Consolidated Steel & Wire Co., Altman, Miller & Co. and the Galveston Rope & Twine Co. No judgment or order whatever was entered against either the Altman & Miller Buckeye Co. or the Galveston Rope Co. Judgment for costs was entered against the Buck Stove & Range Co., Samuel Cupples Woodenware Co., St. Louis Refrigerator and Wooden Gutter Co. and St. Louis Glass & Queensware Co., but not against any of the other corporations.

The judgment and orders so made have been affirmed by the Supreme Court of Kansas and from its judgment seven corporations, among which are included Altman & Miller Buckeye Co. and Galveston Rope Co. which were not parties in the district court, are joined in a writ of error from this court to the Supreme Court of Kansas, while Altman, Miller & Co. and Galveston Rope & Twine Co. which were parties in the district court, do not appear as plaintiffs in error here.

The only assignments of error which suggest a federal question are the 10th, 15th, 16th, 17th, 18th, and 19th and these questions, though not clearly stated, seem to be that the Kansas statute above quoted is void as applied to this case under the Inter-state Commerce Clauses of the Constitution of the United States, and that the statute also impairs the obligations of contracts. (Record, pp. 2 and 3.)

And thereupon said defendants in error move the court to dismiss the writ of error herein upon the grounds and for the reasons following to-wit:

1. This court has no jurisdiction of the subject matter of said case or of any question presented by the record herein.

2. The Consolidated Steel & Wire Company does not exist, and therefore cannot join or be joined as a plaintiff in error, and cannot present a federal or any other kind of a question for the consideration of this Court.

3. The Altman & Miller Buckeye Company and the Galveston Rope Company, having never been parties to the judgment rendered by the district court of Saline county, cannot prosecute a writ of error to this Court to reverse that judgment, and the refusal of the district court to make them parties does not present any question under the constitution or laws of the

United States, or other basis for the jurisdiction of this court.

4. The dismissal of the actions of the four Missouri corporations for refusal to file their statements as required by the law of Kansas presents a question merely as to the exercise of a corporate power, *viz*, the power to maintain an action in a court of Kansas, and does not present any question as to the regulation of inter-state commerce or the obligation of contracts or other question which this Court has jurisdiction to determine.

5. The statute of Kansas does not in terms or in effect regulate or restrict, or attempt to regulate or restrict, inter-state commerce but does regulate the exercise of corporate powers by corporations, both domestic and foreign, and the decision of the Supreme Court of the state as to its construction and effect is final and conclusive on this Court.

6. The record does not present a question relating to the obligation of contracts, because no contractual relation existed between P. B. Maxson and the plaintiffs, who sought to take his property for the payment of the debt of another. The action was based on an alleged wrong, a fraud, and not on any allegation of contract.

7. Joint errors only are assigned in this Court by all the plaintiffs in error jointly, (Record, pp. 1, 2 and

3) while the orders and judgment of the District Court of Saline County, which were affirmed by the Supreme Court of Kansas, were several as to each of the plaintiffs in error, based on different states of fact, which related to and affected each plaintiff in error severally, and not any two or more of them jointly.

STEPHEN H. ALLEN,

ROBERT STONE,

*Attorneys for defendants in error.*

In addition to the grounds for dismissal set up in the foregoing motion, the defendants in error make the further objection to the jurisdiction of the Court that:

8. The order of dismissal of the action as to the four Missouri corporations, made by the District Court of Saline County, and which was affirmed by the Supreme Court of Kansas, is in substance a ruling on a plea in abatement, and is such a ruling as this Court is prohibited from reversing by Section 1011 of the Revised Statutes of the United States. The Code of Procedure of Kansas makes no mention of pleas in abatement by that name, but questions which may elsewhere be raised by plea in abatement may be raised in Kansas either by motion or answer. The ground on which the order of dismissal was made in this case

was brought to the attention of the Court in both ways, and the order complained of, and which the plaintiffs in error seek to have this Court reverse, is not a final judgment, but merely abates the action until the statute is complied with.

## BRIEF AND ARGUMENT ON THE MOTION TO DISMISS.

### I.

### THERE ARE NO ASSIGNMENTS OF ERROR WHICH THE COURT CAN CONSIDER.

The nineteen assignments of error are all made jointly by all the plaintiffs in error. (Record, pp. 1, 2 and 3.) So far as the Consolidated Steel & Wire Company is concerned it can make no complaint and raise no question, federal or state, because it is dead. The only complaint anyone else can make for it is that it was denied relief because it was dead and because no relief could be given to so dead a corporation. Neither of the other plaintiffs in error has any interest in the question or right to vex this court with questions raised in its behalf.

As to the Galveston Rope Company and the Altman & Miller Buckeye Company, the only question that can be raised on the record is whether they are parties to

the record, and that question admits of but one answer. They are not parties. Neither of the other plaintiffs in error has any interest in this question or right to raise it, nor have these two corporations any common ground of complaint, for they were denied relief on entirely different grounds, applicable to each of them severally, and not in any particular to both of them jointly, nor involving any question of a Federal character.

As to the other plaintiffs in error, they cannot get into this Court yoked with a dead corporation and two outsiders, which were not parties to the case below, nor have they as between themselves any joint ground of complaint. Their business was several and the showing as to each was separate and distinct. Taking all these corporations together it is apparent that there is no common basis for the jurisdiction of this Court and no joint or common question for its consideration.

"A joint assignment of error which cannot be sustained as to all who join therein is bad as to all."

3 Cen. Digest, Sec. 2985, and authorities cited.

"An assignment of errors, like a pleading, must set forth errors which are available to all who join in it. If not good as to all it will not be good as to any. And a joint assignment not good as to all will be defective although it contains proper separate specifications of error."

2 Encyc. Pl. and Pr., 933, and cases cited in the notes.

"Upon a joint assignment of error one of several appellants or plaintiffs in error cannot avail himself of errors which are not common to all his co-appellants but which affect him alone. Nor can parties jointly assign error or take advantage of errors which affect them severally and not jointly. It is an elementary and well-settled rule that joint assignments of error must be good as to all who join therein, or they will not be available as to any of them. If the assignment of error is not good as to one, it will be overruled as to all. This doctrine has been applied in a host of decisions, and under widely-varying circumstances. Thus a joint assignment of error by several appellants presents no questions as to a ruling against one of the appellants only, and is ineffective for any purpose. Accordingly a joint assignment of error by several to the ruling of the court on the separate demurrer of one of them presents no question for the appellate court. A joint assignment of error based upon the action of the court in overruling a motion for a new trial cannot be considered on appeal, where the motion for a new trial appearing in the records was the sole and separate motion of one of the appellants. It has also been held that where parties join in a demurrer, which is overruled as not being good as to one, the other party, if the overruling is error as to him, can make it available only on a separate assignment of error. If appellants jointly assign as error the rulings on the separate demurrers of each, and separate motions for a new trial, such an assignment of error presents no question for the decision of the appellate court, nor is a defect of this character waived by a joinder in error. If a party for whom judgment was rendered and the other appellants jointly assign errors, the assignment will be bad and

the appeal will be dismissed. A joint assignment of errors by several defendants, that the complaint does not charge facts sufficient to constitue a cause of action, cannot be sustained unless the complaint is bad as to all."

2 Cyc. 1003, and authorities cited.

"As the verdicts and judgments were several the writ of error sued out by the defendants jointly was superfluous and may be dismissed without costs, and upon each of the writs of error sued out by the defendants severally the order will be judgment reversed."

*Mutual Life Ins. Co. vs. Hillmon*, 145 U. S. 285.

We respectfully submit that the assignments of error are insufficient to present any question for the consideration of this Court.

## II.

## THE ONLY DECISION OF THE SUPREME COURT OF KANSAS PRESENTED BY THE RECORD IS ITS RULING ON A PLEA IN ABATEMENT, WHICH THIS COURT IS DENIED THE POWER TO REVIEW OR REVERSE.

Section 1011 of the Revised Statutes of the United States provides:

"There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

There was no decision on the merits of this case adverse to the plaintiffs in error. Their suit was abated and dismissed. It is not incumbent on this Court to inquire why. If the decision was merely on a plea in abatemnt the inquiry here is ended. The Kansas Code of Civil Procedure makes no mention of pleas in abatement by that name, but the questions which may be raised where such pleas are recognized are raised in Kansas either by motion or answer. The question of the right of the plaintiffs in error to maintain this action when they had not complied with the section of the statute above quoted was first raised by motion, (Record, p. 7) and afterward by answers. (Record, pp. 8 to 21.) The motion and answers amounted to and were in substance a plea in abatement of the action. They presented the single question of the plaintiffs right to further prosecute the action while they were in default of their statements. This point, and this point only, was determined against the plaintiffs in error. The merits of the case were not decided against them, nor were they concluded from afterward asserting their rights either in that or any other court. Pleas in abatement are thus defined in the Encyclopaedia of Pleading and Practice, Vol. 1. Page 1:

"Pleas in abatement are those which set up matter

tending to defeat or suspend the suit or proceeding in which they are interposed, but which do not debar the plaintiff from recommencing at some other time or in some other way."

It has been settled by the Supreme Court of Kansas that the only effect of noncompliance with the statute is to abate the action; that the plaintiff's cause of action is not taken away, but may be asserted in any other court having jurisdiction, or in the same court after compliance with the law.

"1. Contracts made with a foreign corporation before it has obtained permission under the provisions of chapter 10, Laws of 1898, and chapter 125, Laws of 1901 (Gen. Stat. 1901, § 1259, et. seq.), to do business in this state are not for that reason invalid or subject to cancellation at the suit of one of the contracting parties.

"2. The regulation of foreign corporations under the statutes referred to devolves upon the state, and a private individual is not allowed to interfere except in the single instance of a failure by the corporation to file its annual statement, *and then only to the extent of abating a suit against him until the required statement shall have been filed.*"

*The State v. Book Co.*, 69 Kan. 1.

"The fact that the statute had not been complied with at the time of the execution of the contract does not make the contract void."

*Hamilton v. Reeves & Co.*, 69 Kan. 844.

"The only part of the statute affecting the matter now to be determined is that already quoted in full, which merely provides that no foreign corporation do-

ing business in this state shall maintain an action in any of the courts of the state without furnishing certain information regarding its affairs. The restriction is laid, not upon the doing of business, but upon the use of the local courts. . . . Here the corporation is placed under a disability to sue upon any claim whatever so long as it fails to make the statements exacted of it. (*Swift & Co. v. Platte*, 68 Kan. 1.) Its contracts made during its non-compliance are not held void. *The courts do not take jurisdiction of its controversies and determine them against it because of its past attitude; they merely abate the inquiry until the required statements shall have been made.*"

*Deere v. Wyland*, 69 Kan. 260.

"The sole question presented in this case is whether the corporation, not having filed the statement and procured the certificate required by law before the commencement of the action, could comply with the law thereafter and maintain the action. The court below decided this question in the negative and dismissed the action. The judgment is reversed on the authority of *The State v. Book Co.*, 69 Kan. 1, *Deere v. Wyland*, 69 id. 255, and *Hamilton v. Reeves & Co.*, 69 Kan. 844."

*Ryan Live-stock & F. Co. v. Kelly*, 71 Kan. 874.

The construction given to the statute in the foregoing cases has been steadily adhered to and is the settled law of the state. On a former hearing of this case in the Supreme Court it was further held that before dismissing the case a reasonable time should be given the plaintiffs to comply with the statute, and it was said in the opinion:

"The Court should hear the evidence, and, if the facts alleged in the motion be sustained by the evidence,

tending to defeat or suspend the suit or proceeding in which they are interposed, but which do not debar the plaintiff from recommencing at some other time or in some other way."

It has been settled by the Supreme Court of Kansas that the only effect of noncompliance with the statute is to abate the action; that the plaintiff's cause of action is not taken away, but may be asserted in any other court having jurisdiction, or in the same court after compliance with the law.

"1. Contracts made with a foreign corporation before it has obtained permission under the provisions of chapter 10, Laws of 1898, and chapter 125, Laws of 1901 (Gen. Stat. 1901, § 1259, et. seq.), to do business in this state are not for that reason invalid or subject to cancellation at the suit of one of the contracting parties.

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"The Court should hear the evidence, and, if the facts alleged in the motion be sustained by the evidence,

it should give them a reasonable time in which to comply with the statute. Upon their refusal to do so it should dismiss the suit."

*Vickers v. Buck*, 70 Kan. 584, 586.

Sec. 395 of the Code of Civil Procedure of Kansas (Ch. 95, Gen. Stat. of 1909) and which was not changed when the Code was revised, provides:

"Sec. 395. An action may be dismissed without prejudice to a future action: . . .

Fifth, by the court, for disobedience by the plaintiff of an order concerning the proceedings in the action."

On March 26, 1907, after the evidence had been submitted the court made its findings of fact and conclusions of law, among which were the following:

"That the plaintiff, The Buck Stove & Range Co., The Samuel Cupples Woodenware Co., The St. Louis Refrigerator & Wooden Gutter Co. and The St. Louis Glass and Queensware Co. have each of them ever since 1901, been doing business in the State of Kansas, within the meaning of Section 1 of Chapter 125 of the Session Laws of 1901, and that they have no right to maintain the action until they comply with the provisions of the laws of this state which prescribe the conditions upon which foreign corporations doing business in this state, may maintain actions in the courts of this state." (Record, 41.)

"8. That a reasonable time should be allowed the several foreign corporations who are plaintiffs in this suit and who have been doing business in this state, to comply with the laws of this state relating to foreign corporations doing business in this state, and an order should be made that in the event of their fail-

ure to comply with such laws within the time specified, that this action be dismissed so far as they are concerned."

. . . . . .

"And thereupon the Court granted the Buck Stove & Range Co., The Samuel Cupples Woodenware Co., The St. Louis Refrigerator & Wooden Gutter Co. and The St. Louis Glass & Queensware Co. until the 27th day of August, 1907, inclusive, to present evidence to this court that they have complied with the laws relating to foreign corporations doing business in the State of Kansas."

The proceedings and orders of the trial court in this regard were strictly in accordance with the directions of the Supreme Court of the state above quoted from 70 Kan. 584, 586. The plaintiff disobeyed the order and the court thereupon dismissed the action under Sec. 395 of the Code above quoted. This dismissal merely abated the suit without prejudice to another action.

"The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the act of Congress giving this Court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

*Bostwick v. Brinkerhoff*, 106 U. S. 3.
*Grant v. Phoenix Ins. Co.*, 106 U. S. 429.
*Benjamin v. Dubois*, 118 U. S. 46.

An order dismissing a writ of error for failure to file a transcript in time is not a final judgment that may be reviewed by the Supreme Court. "The dismissal of the writ was a refusal to hear the cause."

*Harrington v. Holler*, 111 U. S. 796.

An order of a Circuit Court remanding a cause to the state court is not a final judgment and cannot be reviewed by writ of error.

*Railroad Co. v. Wiswall*, 90 U. S. 507.

"Code Civ. Proc. N. Y. § 1209 provides that a final judgment dismissing the complaint before or after trial does not prevent a new action for the same cause, unless it expressly declares or it appears by the judgment roll that it is rendered on the merits, held, that where a complaint in an action by plaintiff, a foreign corporation, in a state court of New York, was dismissed for failure of plaintiff to prove that it had received a certificate from the secretary of state authorizing it to do business in the state, such judgment was not on the merits, and was therefore no bar to a subsequent action by plaintiff in a federal court sitting in another state on the same cause of action."

*Glencoe Granite Co. v. City Trust S. D. & S. Co.*, 55 C. C. A. 212.

The case last above cited was decided by the Circuit Court of Appeals of the 3rd Circuit and is exactly in line with the Kansas decisions as to the effect of a dismissal of this kind. No judgment has been entered in this case on the merits, and the ultimate rights of the

parties have not been determined. The findings of fact are favorable to the plaintiffs, and if a final judgment had been entered relief would probably have been given them. The court, however, required them to produce evidence of compliance with the state law before it would adjudicate their rights, and, on their refusal to furnish such proof dismissed the suit, without rendering any judgment on the merits or in any manner concluding the ultimate rights of the parties. Under the authorities above cited no final judgment has been entered from which a writ of error can be taken.

The Circuit Court of Appeals for the Eighth Circuit in the case of *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, also held that the prohibition to sue in the courts of the state had no application to the federal courts sitting within the state. In the opinion in that case the court said:

> "The offence of a failure to comply with the corporation law of the state of Kansas was an offence against the state and not against the plaintiff in this suit. For that offence the state had ample remedy. It could prevent the maintenance of actions by this corporation in its courts." Id. 120 Fed. 898.

From the foregoing decisions it is clear that the statute as construed by the Supreme Court of Kansas, and also by the Circuit Court of Appeals, merely de-

feats the particular suit which is being prosecuted without compliance with it, and does not "debar the plaintiff from commencing at some other time or in some other way." The order of the court dismissing the action for failure to comply with the statute is therefore in substance and effect an order "ruling a plea in abatement" and not subject to review in this Court.

We do not apprehend that it will be contended that this was a plea to the jurisdiction of the court, for the jurisdiction of the trial court has been conceded at all times.

So far as we have been able to discover this Court has always recognized and enforced the limitation placed on its power by Sec. 1011 above quoted, no matter how important or meritorious the claim of error might appear. In *Robertson v. Coulter*, 16 Howard, this Court said in its opinion:

"The question raised by the plea in abatement in this case is one of considerable importance, and on which there is some conflict of opinion and decision, but the judgment of the court below on the plea is not subject to our revision on writ of error." (Quoting Sec. 1011 as above.)

In the case of *Stephens v. Monongahela Bank*, 111 U. S. 197, it was held that a plea of another action pending was a plea in abatement and could not be the subject of review in the Supreme Court.

The case of *International Textbook Co. v. Pigg*, 217 U. S. 91, in which the constitutionality of the statute under which this case was dismissed was considered, is not an authority on the point now under consideration, because it was not raised or discussed. There was no appearance in this Court by the defendant and no suggestion of a want of jurisdiction, and it is unnecessary now to inquire whether the record in that case presented the question we are now discussing, so that, if raised, it would have been available to the defendant.

Although the court in the order disposing of this case used different language with reference to some of the defendants from that applying to others, the utmost effect of the order as to any defendant is a dismissal of this suit without any determination of the merits of it, and without the interposition of any bar against the prosecution of another action on the same state of facts in any court of competent jurisdiction. The order reads:

"It is therefore considered, ordered and adjudged by the Court that these cases, *The Buck Stove & Range Co. et al. vs. C. C. Vickers et al., The Consolidated Steel & Wire Co. et al vs. C. C. Vickers et al.*, which have been heretofore consolidated for trial and judgment, be and the same are dismissed, because they and each of them refused to comply with the laws of Kansas relating to foreign corporations, to which order the

plaintiffs and each of them duly excepted, and that said action be abated as to the Consolidated Steel & Wire Co., the Altman Miller & Co. and The Galveston Rope & Twine Co." A judgment for the costs of the action against the four going concerns follows as a necessary incident to the dismissal of the suit. (Record, p. 46.)

The order contains no reference whatever to either the Altman & Miller Buckeye Co. or the Galveston Rope Co., which appear as plaintiffs in error in this Court.

The language used in the order with reference to the Consolidated Steel & Wire Co., the Altman & Miller Co. and the Galveston Rope & Twine Co. is that the action be abated, and the reason for the abatement was that these corporations had ceased to exist. Notwithstanding the differences in the language used the legal effect of the order is the same as to each and all the plaintiffs except that those still in existence are required to pay the costs.

We apprehend that it is not necessary to cite many authorities in support of the proposition that a judgment for the costs which had accrued in the fruitless action does not amount to a final judgment which will support the jurisdiction of this Court.

"Ordinarily a decree will not be reviewed by this Court on a question of costs merely in a suit in equity, although the court has entire control of the matter of

costs, as well as the merits, when it has possession of the cause on appeal from the final decree."

*Trustees v. Greenough*, 105 U. S. 527.

*Bostwick v. Brinkerhoff*, 106 U. S. 3.

"A judgment in a court of law or a decree in a court of equity for costs which does not dispose of the subject matter of the suit is manifestly only interlocutory."

13 Am. & Eng. Encyc. of Law, 34.

## III.

## NO FEDERAL QUESTION IS PRESENTED AS TO ANY PLAINTIFF IN ERROR.

No question as to the power of the legislature of Kansas to regulate, tax, restrict, or control inter-state commerce is presented by the record. The section of the statute above quoted imposes as a condition to the use of the courts of the state by corporations, whether domestic or foreign, that they shall file annual statements showing the condition of their affairs for the information of the public. In the passage of this statute the legislature had in view regulation of the exercise of corporate powers, not regulation of commerce, manufacturing, agriculture, or any other industry. For a corporation to sue or maintain a suit or recover a judgment is to exercise a corporate power. This power it can derive only from the state. One of

the powers acquired by every corporation by virtue of its charter is, "to sue or be sued", (1 Blackstone, 475), "to maintain and defend judicial proceedings," Gen. Stats. of Kansas, 1905, Ch. 23, Sec. 25. Clearly a domestic corporation acquires its power in Kansas to maintain and defend judicial proceedings from the legislature. It is immaterial what the business of the corporation may be. Suppose a Kansas corporation to be engaged solely in inter-state commerce, as the exportation of grain from Kansas to other states, can there be any doubt as to the power of the legislature of Kansas to prescribe the terms on which a domestic corporation of that kind shall exercise any corporate power, or on which it may be admitted to maintain suits in its courts? If the power of the state to prescribe the terms on which domestic corporations may exercise their powers within its territory is plenary, can foreign corporations demand protection from its courts while refusing to comply with the terms imposed alike on them and on domestic corporations? The law is well settled by a long line of decisions of this Court that the terms on which a foreign corporation may exercise corporate powers within any state may be fixed by such state in its discretion and without being subject to any supervision or control by federal authority. The statute under

consideration, as construed by the Supreme Court of the state, does not render contracts made by foreign corporations with citizens of the state void, where the corporation fails to comply with the law, nor does it absolutely deny a remedy in the courts of the state. It is held to be the duty of the court after proof of failure to comply with the law to still afford an opportunity to do so, and where the statemnts are filed out of time, or even where there is a *bona fide* effort to comply, the suit will not be dismissed. (See cases cited above, and *Jordan vs. Telegraph Co.*, 69 Kan. 140.) The facts on which the decision of the Supreme Court of Kansas was based are not open to question in this Court. Sec. 1011, Rev. Stat. above quoted.

"The decisions of state courts upon questions of fact are not reviewable by writ of error to those courts from the Supreme Court of the United States."

*Chapman & Dewey Land Co. vs. Bigelow*, 206 U. S. 41.

*Thayer vs. Spratt*, 189 U. S. 346.

*Gleason vs. White*, 109 U. S. 854.

*Israel vs. Arthur*, 152 U. S. 355.

*Eau Claire Natl. Bank vs. Jackman*, 204 U. S. 522.

*Dower vs. Richards*, 151 U. S. 658.

"The scope and meaning of a state statute, as determined by the highest court of the state, conclude the

federal Supreme Court in determining on writ of error to the state court whether or not such statute violates the federal constitution."

*Smiley vs. Kansas*, 196 U. S. 447.

*National Cotton Oil Co. vs. Texas*, 197 U. S. 115.

*Tampa Waterworks Co. vs. Tampa*, 199 U. S. 241.

"The corporation being the mere creation of local law can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta vs. Earle*, 'It must dwell in the place of its creation and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other state, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion."

*Paul vs. Virginia*, 8 Wal. 168.

*Ducat vs. Chicago*, 10 Wal. 410.

*Horn Silver Mining Co. vs. State of New York*, 143 U. S. 305.

The question here presented is as to the right of a foreign corporation to prosecute an action for a tort in a court of the state of Kansas. That right has been denied, and the reason for its denial is that the plaintiffs have refused to comply with a police requirement now almost universally found in the legislation of the state. Interstate commerce is not primarily or secondarily affected by the decision under consideration. It is not affected at all, for the plaintiffs were not excluded from doing business in the state. They were not taxed for doing it, and the contracts made by them are not even made unlawful. They had their option to comply with the law within the time allowed them by the court and take their judgment, or to refuse to comply with it and go out of court. They chose the latter course and the court merely enforced the law of the state governing the conditions under which a foreign corporation may use its courts.

No question was raised either in the district court or the Supreme Court of Kansas under section 2 of Article IV of the Constitution of the United States, but if such a question had been raised it would have been of no avail to the plaintiffs in error for the law is well settled by the decisions of this Court that a corporation is not a citizen within the meaning of the

constitutional provision that, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

*Pembina Mining Co. vs. Pennsylvania*, 125 U. S. 181.

*Blake vs. McClung*, 172 U. S. 239.

Whatever doubts may have been formerly entertained on the subject, it is now well settled law that the right of a foreign corporation to exercise its corporate powers within a state other than that of its creation depends solely upon the will of such other state.

*Waters Pierce Oil Co. vs. Texas*, 177 U. S. 28.

*People vs. Roberts*, 171 U. S. 658.

As this is the only question in fact presented by the record, we respectfully submit that it fails to present any question which this Court has jurisdiction to determine, and that the writ of error herein should therefore be dismissed.

*Waters Pierce Oil Co. vs. Texas*, 212 U. S. 112.

## BRIEF AND ARGUMENT ON THE MERITS.

If the Court is of the opinion that the record presents a question which it has jurisdiction to hear and determine, that question must be:

*Has the Legislature of Kansas power to exclude a foreign corporation from using its courts for the enforcement of claims which do not arise out of interstate commerce, or of any contract with or obligation to the United States, or act or duty under its authority?*

The only defendant in these actions having property rights at stake is P. B. Maxson, whose land the plaintiffs seek to take and appropriate to the payment of the judgments they had obtained against C. C. Vickers. The interest of Vickers and wife is merely to defend themselves against a charge of fraud. (Petition, Rec., p. 5.) The claims against C. C. Vickers, on which these judgments were rendered, grew out of the dealings of the firm of W. L. Vickers & Co., at Wichita Falls, Texas. The members of this firm were W. L. Vickers and C. C. Vickers. It is not claimed that P. B. Maxson was a member of the firm, or in any manner obligated for the payment of its debts. C. C. Vickers, a farmer residing in Kansas, furnished all the capital and his nephew, W. L. Vickers, managed the business, none of which was transacted in the state of

Kansas. (Finding No. 8, Rec., p. 36.) The judgments, for the payment of which the plaintiffs sought to take Maxson's property, were all against C. C. Vickers alone. In this suit the state of Kansas enforced against the plaintiffs, all of which are foreign corporations, a provision of its statute, which in terms applies alike to all corporations, domestic and foreign, and requires them, as a condition precedent to the exercise of the corporate power of suing in a court of the state, to file a statement in the office of the Secretary of State giving certain information as to the affairs of the corporation. Has the State of Kansas in a case of this kind the power to make and enforce such a requirement? We presume that the power to enforce this requirement on a domestic corporation, engaged only in domestic business, will not be questioned here. Could the domestic corporation, brought into being by the state, by afterward engaging in interstate commerce render itself superior to its creator and successfully deny its authority? Manifestly not. How far then are the powers of foreign corporations, brought into existence by the laws of another state and engaged in interstate commerce, superior to those of domestic corporations similarly engaged? Before attempting to answer this question let us consider the general rule as to the corporate life, the vital essence

of a corporation outside of the sovereignty that created it.

"The corporation being the mere creation of local law can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta vs. Earle*, 'It must dwell in the place of its creation and cannot migrate to another sovereignty.' The recognition of its existence even by other states and the enforcement of its contracts made therein, depend purely upon the comity of those states —a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

*Paul vs. Virginia*, 8 Wall. 168.

*Ducat vs. Chicago*, 10 Wall. 410.

*Horn Silver Mining Co. vs. New York*, 143 U. S.

*Hooper vs. California*, 155 U. S. 648.

The rule thus broadly laid down is subject to the limitation often declared by this Court that "a state cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in in-

terstate commerce, or impose any burdens on such commerce within its limits." *Norfolk & Western Railroad vs. Pennsylvania*, 136 U. S. 114, 118.

In the cases of *Western Union Tel. Co. vs. Kansas*, 216 U. S. 1, and *Pullman Co. vs. Kansas*, 216 U. S. 56, this Court had under consideration the provisions of the statute which prescribe the terms on which a foreign corporation may be admitted to do business in Kansas, and require as a condition to such admission the payment of a specified per cent of its capital stock. The suits were brought by the state to exclude those corporations from the transaction of domestic business in the state, until they complied with the law and obtained from the state authority to exercise corporate functions in the transaction of such business. This Court held that the charter fee required was in substance and effect a tax on interstate commerce, that the business of these corporations in the transaction of interstate and domestic business was so closely interwoven that the denial of the right to carry on domestic business would be destructive of the interstate business, and that the state could not thus drive out corporations that had invested large sums in such business when no requirement of any such payment was made by the state. The questions before the Court in these cases were widely different from that pre-

sented in the case now before the Court, for here there is neither a question of taxation of acquired property rights, or of exclusion from the transaction of business. It is merely whether foreign corporations can use the courts of the state while refusing to comply with requirements imposed on all corporations alike, whether domestic or foreign.

We do not deny or attempt to evade the patent fact that the decisions in these cases break over the line of demarkation between the sovereign power of the state in all domestic matters and the exclusive power of Congress over interstate commerce, and deny the state sovereignty over domestic business that is bound up with interstate commerce. The question with which we are now concerned is where is the line drawn under the decisions in these cases? How much if anything is left of the old rule declared in *Bank of Augusta vs. Earle*, 13 Peters, 519? We think that this question is answered in the concurring opinion of Mr. Justice White in *Pullman Co. vs. Kansas*, 216 U. S. 65, 66:

"3. Subject to constitutional limitations, the states have the power to regulate the doing of local business within their borders. As a result of this power, and of the authority which government may exercise over corporations, the states have the right to control the coming within their borders of foreign corporations. In cases where this power is absolute the states

may affix to the privilege such conditions as are deemed proper, or, without giving a reason, may arbitrarily forbid such corporations from coming in. When, therefore, in a case where the absolute power to exclude obtains, a condition is affixed to the right of a corporation to come into a state and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because by accepting the privilege it has voluntarily consented to be bound by the condition. In other words, in such case the absolute power of the state is the determining factor and the validity of the condition is immaterial." (Quoting from the opinion in *Horn Silver Mining Co. vs. New York*, 143 U. S. 305.)

"Having the absolute power of excluding the foreign corporation the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may deem expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the state may require for the grant of its privileges. It does not lie in the foreign corporation to complain that it is subjected to the same law with the domestic corporation."

The question now under consideration is whether these plaintiffs are endowed with corporate life in Kansas, so that they may come into one of its courts and require of it the enforcement of a demand in spite of the will of its legislature and the decision of its courts. The case of *International Textbook Co. vs. Pigg*, 217 U. S. 91, holds § 1283, (Sec. 42, Ch. 23,

Gen. Stat. 1905, copied *supra*, pp. 3 to 5) unconstitutional as applied to a suit brought by a foreign corporation to enforce a contract made in carrying on interstate commerce. Its consideration by this Court presented one of those unfortunate situations, where a question of great public concern, *viz.*, the validity of an act of the legislature of a sovereign state, was submitted to the highest court in the land for final determination, with the special interest attacking the law represented by able counsel and no appearance for, or defence whatever of the rights of the state or its citizens. We shall not now attempt to present any argument which might then have been appropriate on behalf of the defendant, but shall content ourselves with pointing out the distinction between that case and this. The subject matter of that suit grew out of interstate commerce directly. A foreign corporation made a contract with a ciziten of Kansas to perform certain services and furnish certain goods for a specified compensation. The plaintiff performed its contract and the defendant refused to pay. This Court held that the statute imposed a burden on interstate commerce, and that the state could not deny the plaintiff the use of its courts for the enforcement of this contract. The case now before the court did not originate in interstate commerce. It is not claimed that

the defendant Maxson entered into any contract of interstate commerce, or into any contract whatever with the plaintiffs or either of them. As was said by the Supreme Court of Kansas in this case, 70 Kan. 585: "It must be borne in mind that this was not an action to enforce a contract, but a suit sounding in tort." The question here presented is, are these plaintiffs endowed in Kansas with the corporate power of maintaining this suit in a court of the state? One of the powers acquired by every corporation by virtue of its charter is "to sue and be sued" (1 Blackstone, 475); "To maintain and defend judicial proceedings." (General Statutes of Kansas, 1909, § 1722.) These plaintiffs came into court in this case and claimed the right to exercise this corporate power. Between the plaintiffs and the defendant Maxson, who is the only real party in interest, there is no question of interstate commerce. There have been no business dealings between them; no transactions of any kind, state or interstate. The plaintiffs come into a court of Kansas and ask it to appropriate Maxson's property to the payment of Vickers' debt. The Court asks who and what are you? By what authority do you assume to exercise corporate powers in this sovereignty? The plaintiffs answer, we are foreign corporations engaged in interstate commerce. The Court replies, this con-

fers on you no corporate power, no legal existence here. You cannot create yourself by entering into any particular business. The power to sue in this court is a corporate power. Every citizen of the United States has the right to sue in a court of this state, but you are not a citizen of this or any other state. You are nothing but what the law makes you, mere legal entities, existing only where the law gives you life and with only such powers as the law gives you. The laws of other states have no binding force here. Neither Missouri, Illinois, Ohio or Texas can give you any corporate life in Kansas or any power to sue in its courts. The state of Kansas has never conferred on these plaintiffs or any of them any artificial entity, any corporate power, or any right to appear in its courts. The Consolidated Steel and Wire Co., though out of existence by its own voluntary act, has just as much corporate life in Kansas as either of the other plaintiffs, except where the state voluntarily recognizes their existence. The power of a state to confer or withhold corporate powers is an absolute power. So far as we know it has never been claimed that any set of men can under any circumstances compel a state or its officers to grant a corporate charter to them for any purpose. Such grants depend solely on the will of the state. This being so, it is wholly immaterial what

reason is advanced for granting or withholding corporate powers, for it may be done with or without reason. Nor is the power of the state to deny the exercise of a single corporate power, except on the terms imposed by the legislature, diminished or taken away by its voluntary recognition of the existence of foreign corporations for all other purposes. Clearly a state has a right to its own public policy. Clearly it may impose on foreign corporations the same restrictions it imposes on domestic ones. Otherwise the will of the legislature of Missouri is superior in Kansas to that of the legislature of Kansas.

"The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or marine business. She has the power, if she allows such companies to enter her confines, to determine the conditions on which the entry shall be made. And as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting who is in her jurisdiction with any foreign company which had not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory

of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

*Hooper vs. California*, 155 U. S. 648.

"This is an action upon a written contract alleging a breach and claiming damages. It was brought in the United States Circuit Court for the Eastern District of Wisconsin by an Illinois corporation against a Wisconsin corporation. On June 25, 1898, the date when the contract was made, a law had been enacted in Wisconsin, to go into operation later, on September 1, 1898, requiring corporations incorporated elsewhere to file a copy of their charter with the secretary of state, and to pay a small fee as a condition of doing business there. (Wis. Stat. 1898, Secs. 1770b-1978.) This it was admitted that the plaintiff had not done, and the defendant set up that the contract was a contract to do business in Wisconsin after the statute took effect, and that the defendant was justified by the statute in declining to go on. The judge sustained this defence and the plaintiff excepted, contending that the statute did not and could not, constitutionally affect its rights under the contract in question.

"A prohibition of the doing of business after a statute goes into effect is not retroactive in regard to that business, even though the business be done in pursuance of an earlier contract. . . . The prohibition in this case is not absolute, but is only conditional on the failure to deposit a copy of the plaintiff's charter and to pay a small fee. It is merely incident to a regulation which, but for the contract, unquestionably would be proper, and which is familiar in the laws of the state. It can be avoided by compliance with the regulations. We are not prepared to say that the regula-

tion would be unreasonable or invalid as to such a contract as this, even if enacted after the contract was made. But we rest our decision on the narrower ground of the foregoing consideration taken in connection with what we are about to say. . . .

"In modern societies every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made."

*Diamond Glue Co. vs. United States Glue Co.*, 187 U. S. 611.

In determining whether the statute under consideration was passed for the purpose of regulating interstate commerce or not we must consider its general purpose and application. It merely requires all corporations to furnish certain information. What valid objection can be urged against even the policy of the law, and what doubt can there be of the power of the legislature to make the requirements? Is it logical to say that, because some corporation may engage in interstate commerce, the law must allow it to come into the state for all purposes, freed from all the reasonable regulations and requirements that are imposed on domestic corporations? But the statute under consideration has no special reference to commerce, much less

to interstate commerce. It applies to all corporations, whatever the nature of their business, manufacturing, mining, agricultural or anything else, except banking, insurance and railroad corporations, which are under the special supervision of separate departments of the state government and required to make more full and detailed statements of their affairs than other business corporations. Can it be that this Court holds the requirement of such statements, even of corporations engaged in interstate commerce, unreasonably and unconstitutionally burdensome? Wherein does this statute differ in principle from that of Wisconsin considered in the case above cited? This statute was not passed to regulate commerce, but to make certain information as to the affairs of corporations available to the citizens. The penalty imposed for failure to furnish that information is a temporary suspension of the right to exercise, not all, but one corporate function, that of suing in a court of the state, during the period of delinquency. The act deals exclusively with the exercise of corporate powers, a subject over which the power of the legislature is absolute.

*Osborne vs. Florida*, 164 U. S. 650.
*Pullman Co. vs. Adams*, 189 U. S. 420.
*Allen vs. Pullman Palace Car Co.*, 191 U. S. 171.
*Waters Pierce Oil Co. vs. Texas*, 177 U. S. 28.
*People vs. Roberts*, 171 U. S. 658.

In the case of *Security Mutual Life Ins. Co. v. Prewitt* this Court held that a statute of Kentucky, providing for the revocation of the authority of an insurance company to do business in the state by the Commissioner of Insurance if it should remove a suit brought against it into a federal court or should sue a citizen of the state in a federal court, was valid, notwithstanding the well established rule that the insurance company had a perfect right to remove causes into or bring suits in the federal courts, which right the state could not take away. The reason for revoking the authority was held to be an unconstitutional one, but, as the state had the power to exclude the insurance company from the exercise of corporate power in the state without assigning any reason, the fact that it assigned a bad one did not diminish its power to exclude.

"As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

*Security Mutual Life Ins. Co. vs. Prewitt*, 202 U. S. 246, 257.

In the case just cited the power of the state to revoke all authority to do business in the state for a

clearly unconstitutional reason was upheld by this Court. In the case now before the court the exercise of one corporate power only is suspended until the law is complied with. All corporations, domestic as well as foreign, are subject to the same disability under the same circumstances. The requirement of the law for which the exclusion is made is not unreasonable or unusual in the legislation of the states and but for the decision in the case of *International Textbook vs. Pigg, supra*, could hardly be said to be clearly invalid or unconstitutional, (19 Cyc. 1298). The ground for exclusion from exercising the power to sue in a state court is failure to file the required statement while doing business in the state. It is admitted by the plaintiffs that they failed to file the statements and were doing business in the state within the meaning of the statute. If they had denied it the denial would not avail them here, for the finding of the state court on the question of fact is conclusive.

*Doyle vs. Richards*, 151 U. S. 658.

*Israel vs. Arthur*, 152 U. S. 355.

*Gleason vs. White*, 109 U. S. 854.

*Thayer vs. Spratt*, 189 U. S. 346.

*Eau Claire Natl. Bk. vs. Jackman*, 204 U. S. 522.

*Chapman & Dewey Land Co. vs. Bigelow*, 206 U. S. 41.

The language of the law and the decision of the courts of Kansas exclude them and abate their suit. For this Court to hold the statute void does not reach the point now to be decided, for a valid grant of power to sue in a court of Kansas must be found before the order of dismissal can be reversed. The plaintiffs must point out a grant of a corporate power from some governmental agency having legislative authority in Kansas. No mere acts of the plaintiffs themselves can give them such power. The statutes of Kansas deny them the power and the Supreme Court of the state has decided that they do not have it. If the laws of Kansas have not conferred the right on them what laws have? They claim no grant of corporate powers from the government of the United States. The cases all hold that no other state can confer on them a corporate power to be exercised in Kansas, except in carrying on interstate commerce or discharging some governmental function or performing some duty for the United States. The claim then must be that by engaging in interstate commerce they confer on themselves corporate powers to be exercised in all matters whether of interstate commerce or local business. The cases relied on by plaintiffs in error are either criminal prosecutions for failure to pay a license tax, suits to oust a corporation from doing business or cases

directly involving interstate commerce. This case is in another class, and does not directly involve any tax or fee, or any contract or transaction of interstate commerce. It is merely a claim of foreign corporations of the right to require a court of Kansas, maintained at the expense of the people of the state, to appropriate the lands of Maxson to pay their judgments against Vickers.

We respectfully submit that the record in this case presents no question which this Court has jurisdiction to determine, but, if the Court be of the opinion that it has jurisdiction of the merits of the case, we further submit that the decision of the Supreme Court of Kansas is right and should be affirmed.

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of corporations of other States to do business in Kansas, are stated in the opinion.

*Mr. Seneca N. Taylor* and *Mr. Malcolm B. Nicholson*, with whom *Mr. William J. Pirtle* was on the brief, for plaintiffs in error:

There is no misjoinder of plaintiffs in error. *Kansas City* v. *King*, 65 Kansas, 65.

Plaintiffs in error having been engaged exclusively in interstate commerce, the application of the corporation laws of Kansas to them is repugnant to the interstate commerce clause of the Constitution of the United States, and such application cannot lawfully be made. *Cooper Mfg. Co.* v. *Ferguson and Harrison*, 113 U. S. 727.

Plaintiffs in error were entitled to bring and maintain these suits in the courts of the State of Kansas upon the same terms and upon the same footing as an individual citizen of the States of their creation, and of which these corporations were citizens, under § 2, Art. IV of the Constitution of the United States. 133 U. S. 107.

The manner of these people in dealing with the citizens of Kansas is interstate commerce. *Stockard* v. *Morgan*, 185 U. S. 27; *Brown* v. *Maryland*, 12 Wheat. 419; *Welton* v. *Missouri*, 91 U. S. 275; *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489; 1 I. C. C. Rep. 45.

State statutes requiring foreign corporations to comply with certain conditions before doing business in the State have frequently been held inapplicable to a foreign corporation whose only business in the State is selling through traveling agents and delivering goods manufactured outside of the State, since any other construction of the statute would render it void as an interference with interstate commerce. *Havens & G. Co.* v. *Diamond*, 93 Ill. App. 557; *Coit & Co.* v. *Sutton*, 102 Michigan, 324; 25 L. R. A. 819; 4 I. C. C. Rep. 768; *Toledo Com. Co.* v. *Glen Mfg. Co.*, 55 Oh. St. 217; *Mearshon* v. *Pottsville*

*Lumber Co.*, 187 Pac. Rep. 12; *Bateman* v. *Western Star Mill Co.*, 1 Tex. Civ. App. 90; 4 I. C. C. Rep. 260; 20 S. W. Rep. 931; *Davis & R. Bldg. & Mfg. Co.* v. *Dix*, 64 Fed. Rep. 406; *Woessner* v. *Cottam & Co.*, 19 Tex. Civ. App. 611; also *City of Ft. Scott* v. *Pelton*, 39 Kansas, 764; and see *New Orleans Gas Light Co.* v. *Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650.

Plaintiffs in error had a vested right to maintain and prosecute the suits to judgment.

The judgments upon which these suits were founded were obtained in November, 1895, and these suits were commenced June 13, 1896. Chapter 10 of the laws passed by the special session, 1898, became effective on January 11, 1899, two years and six months after these suits were commenced.

Before the passage of that law the courts of the State were open to all corporations alike, foreign and domestic, and no restrictions of any kind placed upon foreign corporations to come into the courts of the State of Kansas and seek their remedy against any of its citizens.

It is not within the power of the legislature to deprive these plaintiffs of the remedy by casting a pecuniary burden upon them.

Plaintiffs in error, having commenced the suits long prior to the enactment of the law in question, had a vested right to maintain such suits and prosecute them to judgment, and were protected in such right by § 10, Art. I, of the Constitution of the United States, prohibiting the States from passing any law impairing the obligation of contracts. This court has repeatedly decided that the remedy is a part of the contract, and any legislative act that deprives a party of a remedy is repugnant to the provisions of said § 10. *Osborn* v. *Nicholson*, 13 Wall. 654; *Fitzgerald* v. *Weidenbeck*, 76 Fed. Rep. 695; *Martindale* v. *Moore*, 3 Blackf. (Ind.) 275; *Root* v. *Sweeney*, 12 S. Dak. 43; *S. C.*, 80 N. W. Rep. 149; also see *Elston* v.

*Piggott*, 94 Indiana, 14; *Maguiar* v. *Henry*, 84 Kentucky, 1; 7 Ky. L. Rep. 695; 4 Am. St. Rep. 182; and *Yeatman* v. *Day*, 79 Kentucky, 186; 8 Cyc. 932; *Williams* v. *Bruffy*, 96 U. S. 176; *Westerly Waterworks* v. *Westerly*, 75 Fed. Rep. 181.

In this respect corporations are no different from individuals. *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114; *Missouri Railway Co.* v. *Patrick*, 127 U. S. 205; *Santa Clara County* v. *Pennsylvania*, 125 U. S. 181.

The Kansas courts construed the law in this case as retrospective, which is contrary to all rules of construction in respect to laws not specifically stating that they are retrospective. *Auffm'ordt* v. *Rasin*, 102 U. S. 623; *Gunn* v. *Barry*, 15 Wall. 624; *Bartruff* v. *Remey*, 15 Iowa, 257.

*Mr. Stephen H. Allen*, with whom *Mr. Robert Stone* was on the brief, for defendants in error:

There are no assignments of error which the court can consider.

The only decision of the Supreme Court of Kansas presented by the record is its ruling on a plea in abatement, which this court is denied the power to review or reverse. Section 1011, Rev. Stat., U. S.

There was no decision on the merits of this case adverse to the plaintiffs in error. Their suit was abated and dismissed. 1 Enc. of Pl. & Pr. 1.

Plaintiff's cause of action is not taken away, but may be asserted in any other court having jurisdiction, or in the same court after compliance with the law. *State* v. *Book Co.*, 69 Kansas, 1; *Hamilton* v. *Reeves & Co.*, 69 Kansas, 844; *Ryan Live-Stock & F. Co.* v. *Kelly*, 71 Kansas, 874.

The construction given to the statute in the foregoing cases has been steadily adhered to and is the settled law of the State. *Vickers* v. *Buck*, 70 Kansas, 584, 586; § 395, Code of Civ. Pro. of Kansas, Ch. 95, Gen. Stat. of 1909.

A judgment or decree to be final, within the meaning of that term as used in the act of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *Benjamin* v. *Dubois*, 118 U. S. 46; *Harrington* v. *Holler*, 111 U. S. 796; *Railroad Co.* v. *Wiswall*, 23 Wall. 507; *Glencoe Granite Co.* v. *City Trust, S. D. & S. Co.*, 55 C. C. A. 212.

The prohibition to sue in the courts of the State has no application to the Federal courts sitting within the State. *Blodgett* v. *Lanyon Zinc Co.*, 120 Fed. Rep. 893.

This court has always recognized and enforced the limitation placed on its power by § 1011, no matter how important or meritorious the claim of error might appear. *Robertson* v. *Coulter*, 16 How. 106; *Stephens* v. *Monongahela Bank*, 111 U. S. 197. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, in which the constitutionality of the statute under which this case was dismissed was considered, is not an authority on the point now under consideration, because it was not raised or discussed.

A judgment for the costs which had accrued in the fruitless action does not amount to a final judgment which will support the jurisdiction of this court. *Trustees* v. *Greenough*, 105 U. S. 527; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; 13 Am. & Eng. Ency. of Law, 34.

No Federal question is presented as to any plaintiff in error.

The terms on which a foreign corporation may exercise corporate powers within any State may be fixed by such State in its discretion and without being subject to any supervision or control by Federal authority. The statute under consideration, as construed by the Supreme Court of the State, does not render contracts made by foreign corporations with citizens of the State void, where the corporation fails to comply with the law, nor does it ab-

solutely deny a remedy in the courts of the State. *Jordan* v. *Telegraph Co.*, 69 Kansas, 140. The facts in which the decision of the Supreme Court of Kansas was based are not open to question in this court. *Chapman & Dewey Land Co.* v. *Bigelow*, 206 U. S. 41; *Thayer* v. *Spratt*, 189 U. S. 346; *Gleason* v. *White*, 160 U. S. 854; *Israel* v. *Arthur*, 152 U. S. 355; *Eau Claire Natl. Bank* v. *Jackman*, 204 U. S. 522; *Dower* v. *Richards*, 151 U. S. 658.

The scope and meaning of a state statute, as determined by the highest court of the State, conclude this court in determining on writ of error to the state court whether or not such statute violates the Federal Constitution. *Smiley* v. *Kansas*, 196 U. S. 447; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Tampa Waterworks Co.* v. *Tampa*, 199 U. S. 241; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Horn Silver Mining Co.* v. *State of New York*, 143 U. S. 305.

The question here presented is as to the right of a foreign corporation to prosecute an action for a tort in a court of the State of Kansas. That right has been denied, and the reason for its denial is that the plaintiffs have refused to comply with a police requirement now almost universally found in the legislation of the States. Interstate commerce is not primarily or secondarily affected by the decision under consideration.

A corporation is not a citizen within the meaning of the privilege and immunity provision. *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Blake* v. *McClung*, 172 U. S. 239.

The right of a foreign corporation to exercise its corporate powers within a State other than that of its creation depends solely upon the will of such other State. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Same* v. *Texas*, 212 U. S. 112. *People* v. *Roberts*, 171 U. S. 658.

As to the merits, the legislature of Kansas has power to exclude a foreign corporation from using its courts for the

enforcement of claims which do not arise out of interstate commerce, or of any contract with or obligation to the United States, or act or duty under its authority. *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Hooper* v. *California*, 155 U. S. 648; *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114, 118.

*Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, and *Pullman Co.* v. *Kansas*, 216 U. S. 56, involved questions widely different from that presented in the case now before the court, for here there is neither a question of taxation of acquired property rights, or of exclusion from the transaction of business.

The statute has no special reference to commerce, much less to interstate commerce. It was not passed to regulate commerce, but to make certain information as to the affairs of corporations available to the citizens. The penalty imposed for failure to furnish that information is a temporary suspension of the right to exercise, not all, but one corporate function, that of suing in a court of the State, during the period of delinquency. The act deals exclusively with the exercise of corporate powers, a subject over which the power of the legislature is absolute. *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Palace Car Co.*, 191 U. S. 171; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *People* v. *Roberts*, 171 U. S. 658; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 257.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By suits begun in the District Court of Morris County, Kansas, and consolidated for purposes of trial and judgment, seven judgment creditors of one Vickers sought to set aside, as fraudulent, a conveyance by him and to

subject the land included therein to the satisfaction of their several judgments. The plaintiffs were corporations organized under the laws of States other than Kansas, and four of them were doing a purely interstate business in that State, but without complying with its laws presently to be mentioned. The defendants set up this non-compliance by an answer in the nature of a plea in abatement, and the court sustained the plea and dismissed the suits as to the four plaintiffs. As to the other three plaintiffs, relief was denied for other reasons, which need not be stated. The judgment was affirmed by the Supreme Court of the State, against the contention that the laws of Kansas under which the plea in abatement was sustained are violative of the commerce clause of the Constitution of the United States, 80 Kansas, 29, and then the case was brought here.

Some minor questions of appellate practice were urged upon our attention, but their statement and consideration have become unnecessary through the concession of counsel for plaintiffs in error, made during the oral argument and acted upon at the time, that the writ of error might be dismissed as to the Aultman and Miller Buckeye Co., the Consolidated Steel and Wire Co., and the Galveston Rope Co. Therefore, attention need be given only to the ruling upon the plea in abatement.

Our power to review this ruling is challenged, because of the statutory provision that there shall be no reversal in this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court." Rev. Stat., § 1011. This provision has been part of the judiciary acts from the beginning, and often has been applied upon writs of error to the circuit and district courts, but never to a case coming here from a state court. *Piquignot* v. *Pennsylvania Railroad Co.*, 16 How. 104, and *Stephens* v. *Monongahela Bank*, 111 U. S. 197, illustrate its application in cases brought here from

circuit courts, and *International Textbook Co.* v. *Pigg*, 217 U. S. 91, and *International Textbook Co.* v. *Lynch*, 218 U. S. 664, are cases in which it was not applied upon writs of error to state courts. This difference in the treatment of the two classes of cases has not been inadvertent but deliberate, and the reason for it is at once apparent when § 22 of the original Judiciary Act, 1 Stat. 84, c. 20, is examined. The provision originated in that section and was there associated with other provisions which unmistakably show that it was intended to embrace only writs of error to the circuit and district courts. At the time of the revision in 1873, § 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; but that, in the absence of some substantial change in phraseology, did not work any change in their purpose or meaning. Rev. Stat., § 5600; *Hyde* v. *United States*, 225 U. S. 347, 361; *McDonald* v. *Hovey*, 110 U. S. 619. This is a writ of error to a state court, and so our power to review the ruling upon the plea in abatement is not affected by § 1011.

The statute of Kansas under which the plea was sustained is embodied in the General Statutes of 1905, and provides, in §§ 1332–1336, that to entitle a corporation organized under the laws of another State to do business in Kansas it must (*a*) make application to, and obtain the permission of, the Charter Board of the State, (*b*) accompany its application with a fee of $25.00, (*c*) file with the Secretary of State its irrevocable consent that process against it may be served upon that officer, (*d*) be organized for a purpose for which a domestic corporation may be organized, (*e*) pay to the State Treasurer, for the benefit of the permanent school fund, a specified per cent. of its authorized capital, and (*f*) file with the Secretary of State a certified copy of its charter. And by § 1358 the